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NO. 03-1517

IN THE SUPREME COURT OF THE UNITED STATES

TIM SCARROT and ANDREW KOPONEN, *Petitioners,*

v.

KELY WILKINS, et al., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONERS OF AMICUS CURIAE THE CALIFORNIA ATTORNEY GENERAL ON BEHALF OF THE STATE OF CALIFORNIA

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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-_____

TIM SCARROT and ANDREW KOPONEN, *Petitioners,*

v.

KELY WILKINS, et al., *Respondents.*

INTEREST OF THE ATTORNEY GENERAL OF CALIFORNIA

The California Attorney General, as the chief law enforcement officer of the State of California, writes in support of petitioner-officers to urge this Court to grant the writ. This case raises important issues concerning the law of qualified immunity and particularly, the correct approach for determining whether factual disputes concerning the legality of the use of deadly force by police under the Fourth Amendment will preclude the officers entitlement to qualified immunity.

As the designated chief law officer of California (Cal. Const., Art. V, § 13), the Attorney General has a clear duty to see that all law enforcement officers are able to vigorously enforce the laws and make difficult, often split-second decisions about when to employ deadly force without the fear that their decisions, if constitutionally reasonable, will nonetheless be subjected to unnecessary and burdensome scrutiny before a jury at trial.

The California Attorney General represents many state law enforcement agencies and officials in civil rights and tort

litigation in federal and state courts, including the California Highway Patrol, the largest law enforcement agency in California. The California Attorney General also represents in litigation agents of the California Department of Justice Bureau of Narcotics Enforcement and Bureau of Investigation. Thus, the Attorney General has an important stake in ensuring that the federal civil rights laws applicable to peace officers in California are faithfully and correctly applied.

The Attorney General is uniquely situated by virtue of these duties and responsibilities to address the key issues in this case, which concern the appropriate balance to be struck in applying Fourth Amendment standards regarding the use of deadly force, in the context of qualified immunity.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S MISAPPLICATION OF *SAUCIER* UNDERMINES THE STRONG INTEREST OF PEACE OFFICERS IN HAVING ISSUES OF QUALIFIED IMMUNITY RESOLVED AS A MATTER OF LAW WELL BEFORE TRIAL

A. The Court of Appeals' Focus on Factual Disputes as to the Reasonableness of Force Failed to Focus on the Legal Issue as to Whether the Use of Force Could Be Deemed Reasonable.

The law enforcement community has a strong and abiding interest in the courts' clear and consistent guidance in the caselaw regarding the proper use of deadly force. In acting to secure the community and to prevent crime, it is essential for the personal safety of the officers and the community that when officers encounter armed and apparently dangerous individuals,

they are able to act decisively and without hesitation. The use of deadly force under the Fourth Amendment thus incorporates the concept that reasonable officers in emergency situation might mistakenly use more force than is necessary, or use force that appears to be necessary, but actually is not required. Under this Court's qualified immunity jurisprudence which culminated in *Saucier v. Katz*, 533 U.S. 194 (2001), so long as an officer's use of force is within a range of reasonable options, immunity will attach despite the fact that other reasonable officers, with the benefit of 20/20 hindsight, might disagree with the conclusion that deadly force was required. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (use of force to be judged "from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight . . . ."). Indeed, as the Court opined in *Saucier v. Katz*, *supra*, 533 U.S.: "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed."

It was clear in this tragic case that officers Scarrot and Koponen did not know that the man they shot was an undercover officer, nor is there a scintilla of evidence in the record that either officer acted in bad faith when they opened fire to prevent what they thought was an impending murder. Under the circumstances of this case, it cannot be said that they knowingly violated the law. Contrary to the decision of the Ninth Circuit, the fact that other police officers or police "experts" could later disagree as to whether or not deadly force was justified, with the benefit of perfect hindsight knowledge, should not operate to deprive the officers of qualified immunity or force them to face a trial where the officers made a decision that was clearly within the range of constitutionally reasonable alternatives.

The California Attorney General believes that the Ninth Circuit badly misconstrued this Court's precedent in *Saucier v. Katz*. Under this Court's qualified immunity jurisprudence, the fact that officers of reasonable competence could disagree as to

the necessity for the use of deadly force does not mean that a jury trial is needed to resolve the different views. Rather, if "officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Under *Saucier*, only if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," should immunity not apply. *Saucier*, 533 U.S. at 202.

B. The Ninth Circuit's Approach Improperly Delegates The Determination of Qualified Immunity to Juries.

With the Ninth Circuit's confused approach, the existence of factual disputes as to the underlying reasonableness of an officer's use of force forecloses the mandatory legal inquiry into the objective reasonableness of the officer's conduct. This, in turn, results in a wholesale denial of qualified immunity at any stage in proceedings short of trial by jury. The Ninth Circuit's approach is fundamentally at odds with the admonition of this Court in *Saucier* and its earlier decision in *Hunter v. Bryant*, 502 U.S. 224 (1991). In *Hunter v. Bryant*, the Court stressed that the issue of immunity should not be placed "routinely" in the hands of the jury, but "ordinarily should be decided by the court long before trial." 502 U.S.at 228. Moreover, the Ninth Circuit's analysis ignores the essential question mandated by *Saucier* and it predecessors: "the court should ask whether the [officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed [years] after the fact." *Id.*

The analysis employed by the Ninth Circuit in this case is clearly in conflict with this Court's precedents as to the proper approach to determining the issue of qualified immunity. A dispute in the opinions of police officers or between police practices experts as to the proper force to be utilized in a

situation should not preclude the application of immunity, where the use of force is justified, even if subsequently shown to be mistaken. *See Boyd v. Baeppler*, 215 F.3d 594, 602-04 (6th Cir. 2000) (police entitled to summary judgment in shooting case despite expert testimony a suspect's gunshot wounds made it improbable that he could have raised himself off the ground to again threaten the police before being fatally shot); *King v. Beavers*, 148 F.3d 1031, 1036 (8th Cir. 1998) (expert's opinion the police behaved unreasonably in acting outside their territorial jurisdiction was irrelevant to the issue of whether the challenged conduct violated the plaintiff's constitutional rights); *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th Cir. 1996) (in order to hold the police liable under section 1983 for an in-custody death the plaintiff must produce a great deal more evidence than expert testimony that the police violated "generally accepted police customs and practices"); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996), overruled in part by *Acri v. Varian Assocs.*, 114 F.3d 999 (9th Cir. 1997) (police entitled to summary judgment in shooting case despite expert testimony they violated proper police procedures since "the fact that an expert disagrees with an officer's action does not render the officer's actions unreasonable"); *Roy v. Inhabitants of the City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) (an expert's belief an officer could have done a better job and avoided the need to shoot is not determinative where the officer's actions were neither "plainly incompetent" nor "clearly proscribed"); *Maltby v. Winston*, 36 F.3d 548, 564 (7th Cir. 1994) (court excluded plaintiff's expert on general police procedure as incompetent to testify on undercover drug operations); *Berry v. City of Detroit*, 25 F.3d 1342, 1352 (6th Cir. 1994) (rejecting the notion that there exists a "field" of expertise in the non-specific area of "police policies and practices").

It should not be enough to defeat qualified immunity simply to argue that under one interpretation of the facts, an officer's use of force could be deemed objectively unreasonable.

Reconsideration of an event will almost always, as here, reveal that an officer could have done something differently if he had known the future before it occurred. Should the Ninth Circuit's approach stand, however, with its focus on hindsight second-guessing and undue deference to fact finding by a jury, as opposed to a judge, the essential benefits of the immunity will be forever lost. "Because qualified immunity protects government officials from suit as well as from liability, it is essential that qualified immunity claims be resolved at the earliest possible stage of litigation." *Hunter v. Bryant, supra*, 502 U.S. at 233-34. To defeat qualified immunity, a party must do more than simply argue that under one interpretation of the facts — the officer's use of force could be deemed objectively unreasonable.

Indeed, in *Saucier*, this Court emphasized these weighty policy underpinnings of qualified immunity mandate a two-step inquiry well in advance of trial.

> "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' [citation]. The privilege is 'an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' [citation] As a result, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'"

533 U.S. at 200.

After *Saucier*, courts cannot simply stop with a determination that a triable issue of fact exists as to whether an officer acted unconstitutionally. Instead, the qualified immunity inquiry is separate from the constitutional inquiry and thus an officer's claim of qualified immunity should not be defeated simply because a triable issue of fact exists as to whether the decision to shoot was mistaken. *Valance v. Wisel*, 110 F.3d 1269, 1276 (7th Cir. 1997) (plaintiff's testimony he did not "believe" he had committed the charged offense was insufficient to defeat summary judgment). *See* also *Wood v. City of Lakeland, Fl.*, 203 F.3d 1288, 1291-93 (11th Cir. 2000) (police entitled to summary judgment for fatally shooting person threatening suicide with a knife despite the fact that the autopsy report disputed the officers' claim the decedent was holding the knife in a threatening manner when shot); *Gibson v. Rich*, 44 F.3d 274, 277 n.7 (5th Cir. 1995) (police entitled to summary judgment for arresting plaintiff for public intoxication despite alleged factual dispute over whether plaintiff was actually drunk); *Drewitt v. Pratt*, 999 F.2d 774, 777, 780 (4th Cir. 1993) (officer entitled to summary judgment for shooting motorist despite alleged factual dispute over whether the officer could have jumped out of the car's path and therefore avoided the need to shoot).

C. The Net Effect of the Ninth Circuit's Flawed Analysis is to Force Many Excessive Force Cases to Trial in Derogation of the Immunity's Purpose.

The Ninth Circuit's error here mirrors a mistaken approach which this Court corrected in its earlier summary reversal of the Ninth Circuit in *Hunter v. Bryant*, 502 U.S. 224 (1991). In reversing the Ninth Circuit's denial of qualified immunity in the earlier Fourth Amendment false arrest case, this

Court noted in its opinion:

> "The decision of the Ninth Circuit ignores the import of these [qualified immunity] decisions. The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' [citation] This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. [citation] Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable interpretation of the events can be constructed five years after the fact."

502 U.S. at 227-28.

The error and confusion of the *Wilkins* panel in the instant case was highlighted by its quotation from Justice Ginsburg's concurring opinion in *Saucier*. *Wilkins v. City of Oakland*, 350 F.3d at 949, 956 (9th Cir. 2003). This reliance on the *Saucier* concurrence is misplaced, for Justice Ginsburg's concurring opinion ultimately disagreed with the majority's view that qualified immunity involved a two-step analysis. Contrary to the majority, Justice Ginsburg stated:

> "[A]n officer who uses forces that is objectively reasonable in light of the facts and circumstance confronting [him]simultaneously meets the

> standard for qualified immunity . . . and the standard the Court set in *Graham* for a decision on the merits in his favor. Conversely, an officer whose conduct is objectively unreasonable under *Graham* should find no shelter under a sequential qualified immunity test."

Saucier, supra, 533 U.S.. at 214 (citations omitted) (Ginsburg, J., concurring).

As Justice Ginsburg reasoned further, "[o]nce it has been determined that an officer violated the Fourth Amendment by using 'objectively unreasonable' force as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do."

Id. at 216-17.

In this sense, the *Wilkins* opinion expresses the minority view of the dissenters in *Saucier*, and is deserving of reversal, because it would preclude the application of the qualified immunity defense to police officers in many, if not most, arrest cases (not just in shooting incidents) where factual disputes can almost always be created to raise questions concerning the reasonableness of the officers' conduct. After *Saucier*, however, a claim of immunity must be upheld unless, at the time of the asserted violation, settled law clearly proscribed the officers' actions. Put another way, *Saucier* should allow for qualified immunity where the circumstances show that an officer made a constitutionally reasonable judgment based on a factual misperception.

D. Negligence Actions should be Tried in State Courts, Not in Federal Courts as Disguised § 1983 Actions.

Another undesirable consequence of the Ninth Circuit's erroneous analysis in this case is the resultant need for trial in federal court of a case which should properly be addressed only in state court as a negligence case. Indeed, the deferential approach embodied in this Court's qualified immunity jurisprudence serves to winnow out cases which only involve, police mistakes, which do not involve issues of constitutional import.

When enough material facts are undisputed to justify an officer's conduct objectively for purposes of the qualified immunity analysis, then there is nothing for a jury to do except second-guess the officer, which the federal courts have been loathe to do since this Court's opinion in *Graham v. Connor*. If this Court's deadly force and qualified immunity rulings since *Graham* and *Harlow* stand for anything, it is the proposition that constitutional tort litigation does not equate to common law tort litigation, in which negligence is a matter of degree to be resolved by a jury, provided a plausible argument may be made for the view that the defendant officer was negligent.

This Court has repeatedly cautioned that although section 1983 creates a species of tort liability, it is not designed or intended by Congress to serve as a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). But, permitting a jury the freedom to determine for itself whether particular conduct was ultimately reasonable within the meaning of the Fourth Amendment would introduce precisely the kind of *ex post* reassessment that *Graham, Harlow, Hunter* and *Saucier* decried.

Under the Constitution, the correct question is how things appeared to objectively reasonable officers at the time of the events, not how they appear in the courtroom to a cross-

section of the civilian community.

Judges, rather than juries, determine what limits the Constitution places on official conduct. Although the Ninth Circuit treated the reasonableness of the police officers' conduct in this case in a manner indistinguishable from the treatment of negligence in an ordinary tort suit, it does not pass muster and must be reviewed and reversed. To say that police officers have acted within the bounds of the Constitution is not to say that they have acted wisely, but that issue is left properly to resolution by the States. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) ("In sum, the Fourth Amendment addresses 'misuse of power'[citation] not the accidental effects of otherwise lawful government conduct."); *Bell v. Irwin*, 321 F.3d 637, 640 (7th Cir. 2003) (rejecting treatment of section 1983 excessive force case as state law negligence case); *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002) (negligent police conduct not actionable under Fourth Amendment).

E. The Ninth Circuit Employed a Definition of Clearly Established Law at a Level of Generality which Effectively Precluded Immunity.

Despite its protestations to the contrary, the Ninth Circuit's ruling cannot be squared with *Saucier*, because it omitted the second step of the *Saucier* analysis: determining whether, even assuming that the officers' mistake regarding the use of force violated the Fourth Amendment, the mistake was nonetheless not so unreasonable such that no reasonable officer could conclude that the shooting was unjustified. However, by defining clearly-established law to be an absolute proscription against "the use of deadly force against a fellow police officer," the lower court's opinion left no room for an reexamination of the officers' use of force, in the context of the facts of the case, to determine whether the deadly force could be justifiable. *Wilkins, supra*, 350 F.3d at 955.

The error in the ruling was inherent in the Ninth Circuit's definition of what constituted clearly-established law - defining it within a level of generality which effectively precluded immunity in many cases where an underlying constitution violation could be found.

> "It is undisputed - - and the officers do not contest - that the Fourth Amendment bars the use of deadly force against a fellow police officer effecting an arrest, and that there could be reasonable mistake about this prohibition. Indeed, in *Jensen v. City of Oxnard*, 145 F.2d 1078 (9th Cir.), *cert. denied*, 525 U.S. 1016 (1998), we held that 'it was clearly-established that police officers retain their Fourth Amendment rights,' 145 F.3d at 1085, and obvious from common sense that the decedent police officer in that case 'had the right to be free from an unreasonable seizure even from a fellow officer in the course of police work."

Wilkins, supra, 350 F.3d at 955, quoting *Jensen, supra*, 145 F.3d at 1086.

This generalized definition of "clearly-established" law employed by the Ninth Circuit directly conflicts with this Court's admonition in *Saucier* against the use of abstract definitions of the law for determining whether qualified immunity can be applied.

> "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential

> step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable."

Saucier, supra, 533 U.S. at 201.

This Court mandated in *Saucier* that the inquiry with respect to clearly-established law in step two of the qualified immunity test be fact-specific, rather than in terms of abstract propositions of the law.

> "'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' [citation] The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."

Id. at 202.

In the context of excessive force claims, the Court explained:

> "Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force' *Priester v. City of Riviera Beach*, 208 F.3d 919, 926-927 (CA 11 2000), and to ensure that before they are subjected to

> suit, officers are on notice their conduct is unlawful."

Saucier, supra, 533 U.S. at 206.

Contrary to the view of the Ninth Circuit, there is no absolute constitutional right protecting against police mistakes regarding the necessity for the use of force. By defining clearly-established law as a proscription against the use of deadly force against a fellow officer, the lower court erroneously foreclosed any inquiry into the legal reasonableness of the use of force under the circumstances of this case. As this Court has repeatedly made clear, the crucial inquiry cannot be at such a high level of generality that the qualified immunity analysis "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

The question here was not whether respondent's decedent enjoyed a right to be free from excessive force. Rather, the issue for purposes of qualified immunity, is whether, "in the light of pre-existing law the unlawfulness [of the officers' specific actions was] apparent." *Id.*

II.

THE NINTH CIRCUIT'S OPINION HIGHLIGHTS THE SPLIT IN THE CIRCUITS REGARDING THE PROPER PROCEDURE TO BE UTILIZED IN MAKING THE ULTIMATE IMMUNITY DETERMINATION

A. The Circuits are Divided with Respect to the Correct Roles of Judge and Jury in Deciding the Issue of Objective Reasonableness.

The lower court's undue deference in this case to jury resolution of the qualified immunity issue reflects a split in the

circuit courts as to the proper procedure to decide the immunity issue when it is claimed that disputed issues of fact exist to preclude resolution on summary judgment. Even before *Saucier*, a number of circuits, including the Ninth Circuit, had endorsed an approach that permits a jury to evaluate the objective reasonableness of a defendant official's conduct once it had been decided that the participation of a jury was necessary for the resolution of factual issues. *Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) (jury to consider issue of objective reasonableness in deadly force case); *Ortega v. O'Connor*, 146 F.3d 1149, 1156 (9th Cir. 1998) (issue of objective reasonableness submitted to jury); *Oliveira v. Mayer*, 23 F.3d 642, 650 (2nd Cir. 1994) (holding that district court should have let jury decide issue of objective reasonableness).

Other circuit courts of appeal, in line with *Hunter v. Bryant*, determined that even if it was claimed that disputed facts precluded summary judgment, the judge was required to decide the ultimate immunity question. *Curley v. Klem*, 298 F.3d 271, 278-79 (3rd Cir. 2002) (noting the split in the circuits and holding that the judge should ultimately decide the qualified immunity issue); *Swain v. Spinney*, 117 F.3d 1, 10 (1st Cir. 1997) (judge is to decide the issue of immunity); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996); *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992).

As argued in the petition for certiorari after *Saucier, some* panels in Ninth Circuit have collapsed the two-step qualified immunity test into a single determination of Fourth Amendment reasonableness, thus effectively precluding room for a separate determination of "arguable" objective reasonableness. (Cert. Pet., at pp. 17-20). *Rivas v. City of Passaic*, 365 F.3d 181 (3rd Cir. 2004) (once issues of fact found with respect to claimed Fourth Amendment excessive force violation, it was for jury to resolve the issue whether use of force was objectively reasonable): *Olsen v. Layton Hills Mall*, 312 F.3d 1304 (10th Cir. 2002) (ruling that summary judgment cannot be granted on qualified immunity grounds if there are

factual disputes as to existence of constitutional violation); *Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2002) (apparently requiring officer to conclusively establish reasonableness of use of force to obtain qualified immunity).

Curiously, another panel of the Ninth Circuit prior to *Wilkins* correctly applied *Saucier* to reverse the district court's denial of qualified immunity in a Fourth Amendment deadly force case in the face of a factual dispute concerning the reasonableness of the tactics used. *Billington v. City of Boise*, 292 F.3d 1177 (9th Cir. 2002) (dicta); *see also Marquez v. Gutierrez*, 322 F.3d 689, 691 (9th Cir. 2003) (Eighth Amendment prison case involving mistake of fact in use of deadly force).

B. Peace Officers Need the Protection of Clear and Consistent Guidelines in the Caselaw of Immunity in Deadly Force Cases.

As this Court recognized in *Graham v. Connor*, the proper analysis for any police use of force - deadly or non-deadly - places the focus on the objective reasonableness of the force at the moment it is used. 490 U.S. 386, 396 (1989) (decrying the "20/20 vision of hindsight"). The tragic facts of the instant case reflects that most shootings take place at close range, in confused circumstances, and occur within a matter of seconds. Therefore, in a shooting case, the proper inquiry should focus on the circumstances facing the officers at the time the shooting decision is made, considering only the facts known to the officers at the time of the decision.

Graham provides only a general framework for assessing whether a particular use of force is legal under the Fourth Amendment, operating through a balancing test: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

Graham, supra, 490 U.S. at 397. This is the question normally answered by juries in police excessive force cases.

Saucier recognized that although relevant to the qualified immunity inquiry, the *Graham* standard is too abstract to provide the clear legal standard required to fulfill the purposes of immunity delineated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In this instant case, the Ninth Circuit terminated the qualified immunity analysis because of the claimed existence of disputed facts with respect to the underlying violation and consequently foreclosed the inquiry into whether an officer in the case could have believed his use of deadly force was lawful.

In this case, the appropriate question was whether reasonable officers in the position of officers Scarrot and Koponen could have believed that the level of force they used was lawful in light of clearly-established law and the information they possessed. The correct question was not whether other officers or later acquired police practices experts could disagree with the lawfulness of petitioners' use of deadly force. The Court of Appeals failed to answer the correct question, and in so doing, erred.

CONCLUSION

For the foregoing reasons, the California Attorney General believes that the writ of certiorari should be granted.

Dated: July 8, 2004.

Respectfully submitted,

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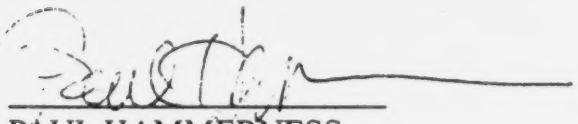

PAUL HAMMERNESS
Supervising Deputy Attorney General
Counsel of Record

No. 04-____

IN THE

SUPREME COURT OF THE UNITED STATES

TIM SCARROT and ANDREW KOPONEN, *Petitioners*

v.

KELY WILKINS, et al., *Respondents*

- - - - - - - - - -

CERTIFICATE OF SERVICE BY MAIL

I , Paul T. Hammerness, a member of the Bar of this Court hereby certify that on July 9, 2004, three copies of the **Brief in Support of Petitioners of Amicus Curaie the California Attorney General on Behalf of the State of California** in the above-entitled case were mailed, first class postage prepaid, to

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I further certify that all parties required to be served have been served.

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